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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. IVAN LEE VASQUEZ, Defendant and Appellant.	G055378 (Super. Ct. No. 14NF4103) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Ivan Lee Vasquez of one count of a lewd act upon a child (Pen. Code, § 288, subd. (a)).[1] Defendant claims his rights to due process and a fair trial were violated by the presence of victim support persons at trial. We disagree and affirm the judgment.

FACTS

The Underlying Crime

In February 2014, when A.P. was 13 years old, she spent the days, and eventually moved in, with her grandfather in Anaheim. A.P. was having behavior problems at home and her grandfather wanted to help out.[2] Defendant rented a room from A.P.'s grandfather. Defendant and A.P. would converse in the kitchen, in the living room where A.P. slept, or in defendant's room.

A week or two after A.P. started spending the days at her grandfather's house, she was chatting with defendant in the doorway of his room and asked if she could borrow a jacket. He told her to come in and sit down, handed her the jacket, put his arms around her, and then placed his hands on her breast for about five minutes, before saying "sorry." A.P. never told anyone else about this touching incident until trial.

Two days later, A.P. and defendant were talking in the kitchen, and he picked A.P. up, pushed her against the wall in the hallway to readjust his grip, took her into his room, pulled off her pants and underwear, and had sex with her. No one else was

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[1] All further statutory references are to the Penal code.

[2] A.P.'s behavioral problems included getting kicked out of the Boys and Girls Club for threatening another child, outbursts, tantrums, and physical destruction. She had been expelled from schools and was known to exaggerate and seek attention. She also made allegations of physical abuse against her father, which he denied and the Orange County Social Services Agency found to be unsubstantiated.

home. A.P. told defendant to stop more than once, and kicked him, trying to get him off. A.P. did not tell her father or grandfather about what happened because she did not want them to hurt defendant.

The next day, as A.P. and defendant were talking in the hallway, defendant again picked A.P. up, put her on his bed, removed her pants, and had sex with her. This happened every day until A.P. moved out. After the first five times, A.P. stopped telling defendant to stop, because she believed it would not stop.

They would have sex at different times of day throughout the house. Sometimes they had sex late at night, when defendant's former fiancé was asleep in his room, or during the day in the bathroom. They always had sex the same way, with just their pants removed. She never saw his penis. A.P. did not remember any other details about the sex, including whether defendant used a condom, or ejaculated, or whether he touched her breast or vagina. She only remembered defendant having tattoos on his arm and legs, and did not identify a tattoo on his pelvis.

A.P. said she loved defendant and wrote him love letters. A.P. eventually told defendant's fiancé what was happening, who then told A.P.'s grandfather. A.P.'s father then took her back home. Two days later, A.P.'s father took her to Orangewood Children's Home, stating he could no longer care for A.P. due to her tantrums and violence toward her younger siblings. A.P. posted various, upsetting messages on defendant's former fiancé's social media accounts, including: "'I hope [defendant] leaves you and, you know, he's been there for me more than your fat ass has ever been there for me and I hope he goes to prison because I have ways of sending him there.'"

Shortly after coming to Orangewood Children's Home, A.P. told a social worker about one of the love letters she wrote to defendant. A.P. did not tell the social worker that defendant touched her because her father was in the room. The social worker discussed the case with another social worker, who said A.P. had admitted she lied about

the allegations and just had a crush on defendant. In September 2014, after arguing with defendant, A.P. told a social worker she had a sexual relationship with him.

The social worker interviewed A.P. on video, with police officers from the Anaheim Police Department watching behind a two-way mirror. A.P. told the social worker defendant raped her and that the pair had sex daily for two months.

Officers then placed a pretext phone call with A.P. to defendant. During the call, A.P. told defendant she had run away. A.P. asked defendant, "[d]o you want to be with me again?" and defendant responded, "[w]hen uh, when you become that age then yeah." A.P. then said, "I actually want to have sex with you again. Do you want to have sex with me?" and defendant responded, "[a]lways." When A.P. said a second time, "I want to have sex with you again," defendant responded, "Okay . . . When?" When A.P. asked defendant "[w]hy'd you have sex with me" he responded "[b]ecause we both wanted to." Defendant was arrested the day after the pretext call.

An information charged defendant with one count of a lewd act upon a child. (§ 288, subd. (a).) It further alleged the count involved substantial sexual conduct, pursuant to section 1203.066, subdivision (a)(8), and that defendant had served a prior prison sentence (§ 667.5, subd. (b)).

The Trial

A jury trial began in April 2017. When the prosecution began asking A.P. about her sexual relations with defendant, she asked for a break. When she returned from the break, A.P. requested for the first time that a support person accompany her on the witness stand. Prior to A.P.'s request, the parties had presumed the support person would remain in the audience. Indeed, defendant had moved in limine to exclude support persons. After some off-the-record discussion, the court stated: "[Defendant] has renewed his objection that was raised during 402 hearings. And although I am sensitive to [his] concern, the code does not appear to give me any discretion in this matter." The

court admonished the support person, a court-employed victim advocate, not to "coach the witness or . . . have communication with her without permission of the court." The court further determined "although the victim advocate may sit near the witness on the witness stand, [the court] asked the attorneys to position the victim advocate's chair to the side and behind the witness so that the witness will not be [tempted] to constantly look [over] her shoulder and look for some sort of guidance." When the court asked defense counsel if he agreed "that it appears to be a mandatory obligation that the court has to allow the victim advocate to accompany the witness," he responded: "I think given those guidelines as the court set out I am reluctantly comfortable with that."

During the same recess, defense counsel expressed his concern with "all these Bikers Against Child Abuse sort of people encircling [A.P.] and doing prayer circles, and it has come to the point where it is – it may be great support for [A.P.], it's also coming to a point where I think it's also sort of this intimidation tactic that's also sort of going on." The court clarified the prayer circles were happening "in the hallway during the break," and not in the courtroom. However: "a number of people came into the courtroom and accompanied the witness [A.P.] when she entered the courtroom. Some of them I saw when I was out in the hallway before we began proceedings this morning. [¶] They're wearing some sort of jean jacket type of what one might use in the biker vernacular 'colors' on the back of the jacket, what I saw was an acronym, and I think it was something like 'B.A.C.A.' and then at the bottom of it said 'Bikers Against Child Abuse.' I didn't see any identification on the front portion of their jackets to indicate that position. [¶] The court has been observing them during proceedings. They have been quiet, they have not obviously attempted to hold up any signs or photographs or create any disturbances."

The court indicated it was willing to give the jury an admonition to not be swayed by this, depending on whether defense counsel "tactically" wanted to call attention to it, but "[i]f they are encircling the witness or praying with her in the hallway, I don't know that I have any constitutional authority to tell them to stop doing that." Defense counsel indicated he wanted the jury to be admonished, "[b]ecause . . . they are out in the hallway with them and they are observing all of these behaviors." He was concerned because of the prayer circles: "[E]very time [A.P.] steps up they encircle her and they start talking to her and, you know, they start — the part that I heard was about how she should be answering. Not the substance, but, 'don't say "uh-huh," say "yes," because the court reporter' — basically reiterating what [the prosecution] said. [¶] But my concern is more sort of these action of encircling her sort of with their backs sort of facing out and the jury members walking by, you know, and them coming every time she comes in, every time she leaves they leave."

The court declined to give an admonishment at that point, stating, "I think it might be more prudent for me to consider the admonition upon defense request at the end of this witness's testimony, because I think that will give both counsel an opportunity to observe further whether there is any untoward behavior. At this point I haven't seen or heard anything from the defense that would indicate improper or untoward behavior." The prosecution then told the court, "we are asking that the individuals, Bikers Against Child Abuse, when there are breaks or recesses will actually move further down the hall or possibly around the corner so they're kind of out of the view of any jurors."

Later in the trial, the court admonished the jury as follows: "you will recall that during [A.P.'s] testimony there were a goodly number of spectators in the audience all wearing what looked like biker colors and on the backs of them it was very obvious to all of us that it was a logo captioned 'Bikers Against Child Abuse.' [¶] Both of the attorneys have asked that I admonish you that obviously that has nothing to do with this case. We don't want you to be swayed one way or the other because of their presence.

Courtrooms in America are open, anybody can come in and watch trial proceedings. We don't normally tell them what clothes to wear or not wear. I just want to make sure that all jurors are reminded of their obligation to base the verdict on the evidence and on the court's instructions and not be swayed by passion, prejudice, or sympathy one way or the other because of unrelated things such as that. [¶] If all jurors agree to follow that admonition please raise your hands. [¶] All jurors have indicated in the affirmative." The court asked the attorneys if they were "satisfied with the informal admonition," and they both indicated they were.

The jury returned a guilty verdict on the sole count, found the special allegation true, and defendant admitted the prison prior. The court struck the prison prior pursuant to section 1385, subdivision (c) and sentenced defendant to eight years in prison. Defendant did not move for a new trial. This appeal followed.

DISCUSSION

Defendant claims his rights to due process and a fair trial were violated because of the presence of a court appointed support person and of a group of spectators wearing "Bikers Against Child Abuse" on the bottom of their jackets at trial. His claims lack merit. We affirm the judgment.

Presence of Support Person

In prosecutions for violations of section 288, every prosecuting witness "shall be entitled, for support, to the attendance of up to two persons of his or her own choosing" while the witness testifies. (§ 868.5, subd. (a).) "Only one of those support persons may accompany the witness to the witness stand." (*Ibid.*)

Defendant's first argument on appeal concerns the presence of the support person that accompanied A.P. to the witness stand. Defendant contends his Sixth

Amendment right of confrontation and his due process rights were violated because A.P. was permitted to have a support person present at the witness stand while she testified without requiring the prosecution to make a specific showing such a support person was needed.[3]

Confrontation and Due Process

In considering constitutional challenges to the provisions of section 868.5, courts have generally found the mere presence of a victim advocate at the stand does not necessarily violate the defendant's constitutional rights. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214 (*Myles*).) In evaluating a due process claim, the court should consider "individualized variables" including the relationship of the support person to the witness, the location of the support person in relation to the witness, and whether the support person engages in any conduct which might influence the witness or the jury. (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1731-1732.) A defendant's rights are only violated if "the support person improperly interferes with the witness's testimony, so as to adversely influence the jury's ability to assess the testimony." (*People v. Spence* (2012) 212 Cal.App.4th 478, 514.)

Defendant argues "[t]he presence of a support person at the witness stand unfairly bolstered the witness's credibility." He relies on *People v. Adams* (1993) 19

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[3] Defendant also asserts the trial court erred because it believed it had no discretion under section 868.5, subdivision (a) to deny the request for a support person at the witness stand. Surely, the court has discretion to control the way the support person behaves and to preclude presence at the witness stand if the support person's conduct threatens a fair trial. But as we will discuss, nothing of the sort happened here. In the absence of any conduct threatening a fair trial, section 868.5, subdivision (a), by its terms, grants the prosecuting witness the right to have two support persons in the courtroom, but limits to one the number of support persons at the witness stand. The court correctly followed the command of the statute where the conduct of the support person was assuredly benign. Thus, even if the court believed it had the discretion to deny presence at the witness stand, it may well have been an abuse of discretion to do so in this case.

Cal.App.4th 412 (*Adams*), which stated the presence of a support person at the witness stand "has an effect on jury observation of demeanor" (*id*. at p. 441), which is an aspect of the Sixth Amendment right of confrontation. (*Id*. at pp. 437, 443.) *Adams* relied on United States Supreme Court authority, which involved not support persons but rather whether victims are permitted to avoid face-to-face confrontation with defendants by testifying behind screens or on closed circuit television. (*Maryland v. Craig* (1990) 497 U.S. 836, 856 (*Craig*) [remand for case-specific finding of necessity for closed circuit television]; *Coy v. Iowa* (1988) 487 U.S. 1012, 1022 (*Coy*) [screen violated confrontation clause, remand for prejudice determination].) *Adams* determined the trial court was required to make a showing of need before allowing the victim's father, who, according to defendant, abused the victim, to go to the witness stand as the victim's support person. (*Adams, supra*, 19 Cal.App.4th at pp. 443-444.) The victim's father was also a testifying witness. (*Id.* at pp. 426, 428.)

The dangers to a defendant's confrontation right presented in *Adams*, *Craig*, and *Coy* are not present here. A.P. testified in person, allowing for face-to-face confrontation. Her support person, a court-appointed victim advocate, was not a testifying witness. Furthermore, the record is devoid of any inkling the presence of A.P.'s support person impacted the jury's perception of A.P. or otherwise influenced her testimony. In fact, the court took precautions to place the support person behind A.P., so as to minimize her impact and to avoid the temptation for A.P. to look at the support person while testifying.

Showing of Need for Support Person

Defendant further relies on *Adams* for the proposition that a showing of need is required prior to allowing a victim advocate to sit with a testifying victim, and that a defendant's confrontation and due process rights are violated in the absence of such a showing. (*Adams*, *supra*, 19 Cal.App.4th at pp. 443-444.)

Adams is distinguishable on these facts for at least two reasons. First, the *Adams* support person was also a prosecuting witness, meaning that the applicable procedure was found in section 868.5, subdivision (b), not subdivision (a). Section 868.5, subdivision (b) requires the prosecution to show that a witness serving as a support person "is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness." Section 868.5, subdivision (a), applicable where the support person is not a testifying witness, does not require a showing of need, i.e., that will be helpful to the prosecuting witness. Because the *Adams* trial court did not require the showing under section 868.5, subdivision (b), that error made the discussion of constitutional issues pertaining to section 868.5, subdivision (a), dictum. As discussed above, A.P.'s support person was not a testifying witness, but a court-appointed victim advocate. Second, in *Adams*, unlike here, the record suggested the victim's testimony could be influenced by her father's presence, based on the fact that the father was accused of physically abusing the victim in the past. (*Adams*, *supra*, 19 Cal.App.4th at p. 434.)

Contrasting the *Adams* conclusion, many courts have found, based on the plain wording of the statute, that no showing of need is required when the support person is not a witness. (See, e.g., *People v. Patten* (1992) 9 Cal.App.4th 1718, 1727; *People v. Johns* (1997) 56 Cal.App.4th 550, 554-555.) Indeed, when the court suggested to defendant that under the circumstances it did not have discretion to refuse to allow A.P. the presence of a support person, counsel to defendant said he was "reluctantly comfortable with that." Defendant did not request a hearing on need or renew his objection to the support person. The court was not required to make a finding of need under these circumstances.

Finally, any alleged error regarding the support person was harmless under any standard. (See, e.g., *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1172.) The court instructed the jury pursuant to CALCRIM No. 200, "You must decide what the facts are. It is up to all of you and you alone to decide what happened based only on the

evidence [that has been] presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision." Jurors were also instructed pursuant to CALCRIM No. 222 that evidence consisted of "the sworn testimony of witnesses, any exhibits admitted into evidence, and anything else I tell you to consider as evidence." The court gave CALCRIM No. 226 which advised jurors, in part, "You alone must judge the credibility or believability of the witnesses . . . . You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice that you may have." These instructions prevented any potential prejudice from the presence of the support person during A.P.'s testimony. (*Myles*, *supra*, 53 Cal.4th at p. 1215.) Moreover, there is no indication the support person did anything which might be misconstrued or deemed improper. Thus even if defendant was entitled to a hearing on need, which he did not request, or if the prosecution was required to make a showing of need for the support person, nothing in the record suggests that the failure to hold a hearing or to show need was prejudicial. Any error in allowing the victim support person to be present at the witness stand was therefore harmless.

Presence of Bikers Against Child Abuse

Defendant asserts the "conspicuous presence of 'Bikers Against Child Abuse'" violated his constitutional rights to due process and a fair trial.

"'[A] criminal defendant has the right to be tried in an atmosphere undisturbed by public passion.'" (*Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 831 (*Norris*).) "A spectator's behavior is grounds for reversal only if it is '"of such a character as to prejudice the defendant or influence the verdict,"' and the trial court has broad discretion in determining whether spectator conduct is prejudicial." (*People v. Winbush* (2017) 2 Cal.5th 402, 463 [trial court within discretion to deny defense request to exclude family members of murder victim silently crying during guilt phase of capital trial]; *Myles*, *supra*, 53 Cal.4th at p. 1215 [no error in presence of murder victim's wife

who "nodding in agreement with prosecution witnesses and crying in court while being comforted by support persons"].)

In *People v. Lucero* (1988) 44 Cal.3d 1006, the defense requested a mistrial after an emotional outburst came from the mother of a victim that addressed the evidence and the arguments of defense counsel. (*Id.* at pp. 1021-1022.) The trial court admonished the jury to disregard the outburst. (*Ibid*.) The California Supreme Court ruled: "The isolated outburst in this case was followed by a prompt admonition. For this reason, and because of the broad discretion afforded the trial court in cases of spectator misconduct, we find no abuse of discretion in the denial of defendant's motion for mistrial." (*Id*. at p. 1024.) The facts in *Lucero* concerned specific allegations of spectator misconduct bearing on the evidence introduced at trial. Even so, our high court determined the trial court's prompt admonition cured the misconduct. Here, the spectators merely sat quietly and wore clothing with "Bikers Against Child Abuse" on the back. Because the court admonished the jury to disregard their presence, under *Lucero*, the court did not abuse its discretion.

Similarly, in *People v. Houston* (2005) 130 Cal.App.4th 279 (*Houston*), the defendant claimed his rights to due process and a fair trial were violated by spectators wearing buttons and placards bearing the likeness of the murder victim. (*Id*. at p. 309.) The trial court admonished the jury that it should not consider the displays for any purpose. (*Ibid*.) The court denied a request for an evidentiary hearing, finding that it had admonished the jury regarding the issue, that the spectators had not committed misconduct, and nothing in the record indicated the jury was prejudiced by the spectators' conduct. (*Id*. at p. 311.)

Defendant relies heavily on *Norris*, *supra*, 918 F.2d 828. The *Houston* court distinguished *Norris*, cited by defendant. In *Norris*, the Ninth Circuit Court of Appeals found inherent prejudice in displays of buttons by courtroom spectators in the absence of admonitions to the jury. (*Norris*, at p. 830.) The *Houston* court distinguished

Norris, noting that in *Norris* the trial court had not admonished the jury to disregard the display. (*Houston*, *supra*, 130 Cal.App.4th at p. 316.) Here, unlike *Norris*, the court properly admonished the jury to disregard the Bikers Against Child Abuse spectators.

Defendant also relies heavily on a Florida decision, *Long v. State* (Fla.Dist.Ct.App. 2014) 151 So.3d 498 (*Long*).[4] In *Long*, "several individuals appeared briefly outside the courtroom, in the presence of four jurors, wearing vests adorned with the words 'Bikers Against Child Abuse' and then a number of those individuals attended the trial not wearing the vests." (*Id.* at p. 507 (dis. opn. of Rowe, J.).) The trial court questioned the jurors about the incident, excused one juror whose response was equivocal, and instructed the bikers not to wear their insignia in the courtroom and not to congregate near the jury. (*Id.* at p. 506 (dis. opn. of Rowe, J.).) The Florida District Court of Appeal determined that "actual or inherent prejudice resulted from the presence of the bikers at the trial." (*Id.* at p. 501 (lead opn. of Van Nortwick, J.) The dissenting opinion in *Long* is instructive: "The record is undisputed that the bikers did not engage in any conduct inside the courtroom to disrupt the trial. The record reflects that none of the bikers wore vests or other identifying insignia inside the courtroom. The trial court took precautionary measures and questioned the venire regarding the effect, if any, of their brief observation of the bikers in their vests outside the courtroom. The three jurors who remained on the jury after questioning all denied that their observations of the bikers would affect them. Finally, the court instructed the jurors not to permit sympathy or prejudice to affect their verdict. Simply put, there is absolutely no evidence in the record that the jurors in this matter were in any way influenced by the presence of the bikers before and during the trial. Indeed, the trial court, who was in the best position to monitor the atmosphere of the courtroom, found no actual or inherent prejudice as a result of the presence of the bikers in the hallway before trial or as a result of the presence

[4] We note *Long* is not binding on this court.

of the unidentified bikers in the courtroom during the trial." (*Id.* at p. 510 (dis. opn. of Rowe, J.).) The dissenting opinion in *Long* is persuasive. We decline to adopt the rationale of the majority opinion in *Long*.

The spectators in the present case had "Bikers Against Child Abuse" only on the bottom and the back of some of their jackets, so presumably the name of the group was not visible while the spectators were sitting in the courtroom. The group did not comment or engage in inappropriate behavior during trial. The trial court timely admonished the jury, who acknowledged it would follow the trial court's admonition. The court also instructed the jury, "You must not allow anything that happens outside of this courtroom to affect your decision." The prosecutor directed the group to engage with the victim down the hall and around the corner from where the jurors were sitting after the group's interactions with the victim were brought to the court's attention. After initially bringing the issue to the court's attention, no additional concerns were raised by either party, court staff, or any juror.

Furthermore, any purported spectator misconduct here was harmless beyond a reasonable doubt. (*Chapman v. State of California* (1967) 386 U.S. 18, 24.) The court admonished the jury to ignore the Bikers Against Child Abuse spectators and the record is devoid of any spectator misconduct. We presume the jury followed the court's admonitions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Under these facts, the mere presence of the Bikers Against Child Abuse spectators did not prejudice the jury's decision. "A defendant is entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) Defendant fails to present adequate grounds to reverse his conviction.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

THOMPSON, J.